words of the will, the executor holds the land in trust to sell, or whether he has a mere power to sell the land. The importance of this distinction is obvious, since in the one case the title to the land vests in the executor, while in the other it vests in the heirs, subject to be divested by the execution of the power of the executor. It is said to be now settled that if the land is devised to the executor to sell, or devised subject to the debts of the testator, this passes the interest in the lands to the executor; but a direction that the executers shall sell the land gives them only a power of sale and no interest in the land." See, also, 18 Cyc. 302, 303.

11 Am. & Eng. Enc. of Law (2d Ed.) 1035, lays down the same rule as in accordance with the weight of authority.

In the instant case, however, T. H. Dickinson did not succeed even to the powers of the executrix with respect to the real estate under Coles' will, by virtue of section 2663. It affirmatively appears from the record that he was not appointed administrator with the will annexed, but administrator only. The validity of such appointment for any purpose, where there is a will, may well be questioned. In Ewing *v.* Sneed, 5 J. J. Marsh. (Ky.) 459, it was held to be void.

[7] Upon this branch of the case, we are of opinion that the legal title to the land devolved upon the heirs at law of J. W. Coles, deceased, subject to be divested only by a lawful execution of the power of sale. The circuit court ought, therefore, to have ordered the action to abate as to T. H. Dickinson, and to proceed in the name of the other plaintiffs, heirs at law of J. W. Coles, deceased, as if such misjoinder had not been made, in accordance with section 3258a of the Code.

The judgment of the circuit court, for the reasons stated, must be reversed, and the verdict of the jury set aside, and the case remanded for a new trial, to be had in accordance with this opinion.

Reversed.

*Note. See Editorial, post, p. 314.

GORDON *v.* JOYNER.

June 8, 1911.

[71 S. E. 652.]

1. **Taxation (§ 748*)—Tax Deed—Limitation.**—To entitle a purchaser at a tax sale to the benefit of Code 1904, § 661, providing that

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

where a purchaser of real estate, sold for taxes under section 666, has obtained a deed therefor and the same has been duly recorded, the title shall be vested in the grantee, subject to be defeated only by proof of specified facts in a suit brought within two years, his deed must have been executed by the proper clerk after the expiration of two years from the date of the tax sale, and after the purchaser has given the four months notice required by section 655.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1494-1499; Dec. Dig. § 748.*]

2. Taxation (§ 749*)—Tax Deed—Execution—Power of Clerk.—The authority conferred on a clerk to execute a tax deed to a purchaser after two years from the date of the tax sale and after four months' notice to redeem, conferred by Code 1904, § 655, is a naked power not coupled with an interest, and must be strictly complied with in order to render a deed executed by him of any validity.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1496; Dec. Dig. § 749.*]

3. Taxation (§ 746*)—Tax Deed—Execution—Person Authorized.—In the absence of a curative statute, a tax deed executed by a person other than the official designated by law to make the same is a nullity.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1491, 1492; Dec. Dig. § 746.*]

4. Taxation (§ 750*)—Tax Deed—Notice—Failure to Serve—Effect.—Code 1904, § 655, provides that after two years from the date of a tax sale the purchaser may obtain a deed from the proper clerk, and declares that in no case shall a deed be executed to a purchaser until after he has given to the person or persons therein mentioned, who are supposed to be interested in the land as owners or lienors and entitled to redeem, four months' notice of the purchase, etc. Held, that a tax deed issued to a purchaser without such notice was a nullity, and was not cured by any of the provisions of section 661, providing that the deed of a purchaser of land sold for taxes pursuant to section 666 shall not be set aside, except on specified grounds, and that no suit shall be brought to vacate the same, except for fraud, after two years.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 1497; Dec. Dig. § 750.*]

Error to Corporation Court of Newport News.

Action by Collins Joyner against Harris Gordon. From a judgment for plaintiff, defendant brings error. Reversed and rendered.

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No, Series & Rep'r Indexes.

Allan D. Jones and *R. M. Lett,* for plaintiff in error.
Samuel R. Buxton, for defendant in error.

BUCHANAN, J. The only question to be determined on this writ of error is whether a deed made to a purchaser at a delinquent land tax sale before he has given the notice required by section 655 of Code Va. 1904 is void, or whether the failure to give such notice is an irregularity which is cured by section 661 of the same Code.

Section 655 provides that, after two years have expired from the date of a tax sale, such purchaser may obtain a deed from the proper clerk, but declares that "in no case shall a deed be made to any such purchaser of any such real estate until after such purchaser has given" to the person or persons therein mentioned, who are supposed to be interested in the land as owners or lienors and entitled to redeem the same, "four months' notice of this said purchase, * * * and the person entitled to redeem said real estate shall have the right to redeem the same at any time before the expiration of the said four months, although such time extend beyond the two years first mentioned herein."

Section 661 provides that where the purchaser of any real estate so sold, or sold in pursuance of section 666, has obtained a deed therefor, and the same has been duly admitted to record in the proper clerk's office, the right or title to such estate shall stand vested in the grantee in such deed as was vested in the party assessed with the taxes or levies on account of which the sale was made, etc., subject to be defeated only by proof (1) that the taxes, etc., for which it was sold were not properly chargeable thereon; (2) that the taxes, etc., properly chargeable on such real estate had been paid; (3) that the notice of the tax sale, where made to a person other than the commonwealth, or notice of the application to purchase, in case the sale was made under section 666, had not been duly given; or (4) that the payment or redemption of said real estate was prevented by fraud or concealment on the part of the purchaser. That section further provides that no suit shall be brought to set aside, cancel, or annul such deed, except for fraud, as therein provided, unless within two years after the same is properly admitted to record.

[1, 2] In order for a purchaser at a tax sale to be entitled to the benefit of the provisions of section 661, he must have obtained his deed in accordance with the provisions of section 655; that is, his deed must be executed by the proper clerk (unless the clerk himself be the purchaser) after the expiration of two years from the date of the tax sale, and after the purchaser has given the notice required by that section. The authority conferred upon the clerk to execure the deed is a mere naked power

not coupled with an interest, and must be strictly complied with. No rule of law is more firmly settled than that in the case of a naked power, every prerequisite to its exercise must precede it. Sulphur Mines Co. *v.* Thompson, 93 Va. 293, 316, 25 S. E. 232, and authorities cited; Reusens *v.* Lawson, 91 Va. 226, 236, 21 S. E. 347; Flanagan *v.* Grimmet, 10 Grat. 421, 435, and cases cited.

[3] In the absence of a curative statute, if the deed be executed by a person other than the official designated by law to make the deed, it is, of course, a nullity. If authorities be needed for so plain a proposition, they can be found in Judge Allen's opinion in Flanagan *v.* Grimmet, supra. If the official be authorized to make the deed after a time named, and he execute it before that time elapses, the deed is also a nullity. Bowe *v.* City of Richmond, 109 Va. 254, 260, 64 S. E. 51; Bradley, Tr., *v.* Patterson, 112 Va. ——, 70 S. E. 540, decided at March term, 1911; Minor on Tax Titles, p. 111, and cases cited. And, a fortiori, the deed must be a nullity when the purchaser not only obtains it without complying with the conditions which entitle him to a deed—i. e., giving the notice required—but when executed by an official in plain violation of the statute which prohibits him from making the deed until four months after the required notice has been given.

[4] It may be true, as argued, that the Legislature has the power to authorize a conveyance to be made to a purchaser at a tax sale without requiring some such notice as that provided for by section 655; but it has not done so. On the contrary, the Legislature has declared that the purchaser shall give notice of his purchase, and that he is not entitled to a deed until he has done so.

There is nothing, as it seems to us, in section 661 which validates a deed executed to a purchaser at a tax sale in violation of section 655. The deed must be made by the clerk. It cannot be made until after two years expire from day of sale, nor until four months after the notice required by that section has been given. The purchaser at a tax sale must comply with the provisions of section 655 before he is entitled to a deed which will give him the benefit of curative provisions of section 661. See Va. Coal Co. *v.* Thomas, 97 Va. 537, 34 S. E. 486; Va. Building, etc., Co. *v.* Glenn, 99 Va. 460, 39 S. E. 136; Bowe *v.* City of Richmond, supra; Bradley *v.* Patterson, supra.

The provision in section 655 requiring the purchaser to give notice of his purchase as therein provided was not in that section when section 661 was enacted as it now stands, March 7, 1900 (Acts 1899-1900, pp. 1234, 1235), but was afterwards enacted by amending section 665 of the Code of 1887 by an act approved April 2, 1902 (Acts 1901-02, p. 779). Section 661 as

found in Code Va. 1904 (not as it was when the deed under consideration in the case of Va. Building, etc., Co. *v.* Glenn, supra, 99 Va. 460, 462, 39 S. E. 136, was executed) does provide that the deed of a purchaser at a tax sale or under the provisions of section 666 of the Code may be set aside, annulled, or canceled by a suit brought for that purpose within two years from the recordation of the deed, upon the ground, among others, that "the notice of the tax sale where made to a person other than the commonwealth, or notice of the application to purchase in case the sale was made under section 666, has not been duly given." Whatever may be the effect of that provision in section 661, as amended, upon the rights of a purchaser under section 666 where the notice required by that section has not been given (Va. Building, etc., Co. *v.* Glenn, supra), it has no reference to the failure to give the notice required by section 655, because at the time that provision was inserted in section 661 the purchaser at a tax sale was not required to give notice of his purchase before obtaining his deed, as he now is under section 655 (Code 1887, and Acts 1901-02, p. 779), and because the language of the provision in section 661 shows that it refers to the "notice of the tax sale" when bid off by such purchaser, and not to the "notice of his said purchase," as provided for in section 655, as amended.

There are several reasons of public policy why a tax deed obtained by a purchaser who was complied with all the requirements of section 655 should cure irregularities in the proceedings which, led up to the sale, and for which such purchaser is in no wise responsible; but there is no reason in a sound public policy or in good morals why a purchaser at a tax sale, who has failed or refused to comply with the conditions upon which he is entitled to a deed and has obtained it in express violation of law, should be permitted to take advantage of his own negligence or wrong and have the same curative effect given the deed as if it had been obtained in accordance with law.

The court is of opinion that, the deed in question having been executed not only without authority, but in plain violation of the positive prohibition of section 655 of the Code, under which it was obtained, is a nullity, and that the trial court erred in not so holding. Since the plaintiff's right to recover depended upon the validity of that deed, it follows that the judgment of the trial court, to whom all matters of law and fact were submitted, must be reversed; and this court will enter such judgment as that court ought to have entered.

Reversed.

*Note. See editorial, post, p. 314.